Filed 6/18/12 P. v. Maxwell CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. KEITH MAXWELL, Defendant and Appellant.	B232260 (Los Angeles County Super. Ct. No. SA003815)

APPEAL from an order of the Superior Court of Los Angeles County. George Gonzalez Lomeli, Judge. Reversed.

David E. Durchfort, Kosnett & Durchfort, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Victoria B. Wilson, Janet Neeley and Yun K. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

In 1990, Keith Maxwell pled no contest to one count of lewd or lascivious acts with a child under 14 years of age and was sentenced to five years on probation. (Pen. Code, § 288, subd. (a).) In 2005, the Department of Justice (Department) granted Maxwell's application for exclusion from the Megan's Law Web site. In 2008, due to a change in the law, Maxwell was required to reapply for exclusion. After the Department mailed the notice required by law to an erroneous address, Maxwell did not reapply, and the Department posted his information on the Megan's Law Web site.

In 2010, Maxwell filed a petition for writ of mandate, stating he had never received notice of the need to reapply and seeking removal of his information from the Web site. The trial court denied the petition, finding Maxwell had failed to carry his burden to "clearly demonstrate" his crime against his four-year-old daughter did not involve either oral copulation or penetration. (Pen. Code, § 290.46, subd. (e)(2)(D)(i).)

Maxwell appeals; we reverse and remand.

FACTUAL AND PROCEDURAL SUMMARY

According to the record, on July 6, 1990, Keith Maxwell was charged as follows: in count one, Maxwell was charged with oral copulation of a person under the age of 14 (his daughter), on and between July 1, 1987 and August 31, 1987, in violation of Penal Code section 288a, subdivision (c)[1]; in count two, Maxwell was charged with committing an act of substantial sexual conduct in violation of section 288, subd. (a), specified as "penetration of the vagina of the victim by a foreign object" by a person occupying a position of special trust (her father), within the meaning of section 1203.066, subd. (a)(9). As to each count, Maxwell was advised that his conviction would require him to register pursuant to section 290. In December 1990, the complaint was amended

---

1 All further undesignated statutory references are to the Penal Code.

to add a third count for violation of section 288, subdivision (a),which contained no factual allegations of oral copulation or penetration; Maxwell entered a nolo contendere plea to count three and counts one and two were dismissed. The trial court (Lawrence J. Mira) selected the upper term of eight years for the base term on count three, suspended imposition of sentence, and placed Maxwell on probation for 60 months, with specified conditions. Maxwell was ordered to register as a sex offender under section 290. Maxwell successfully completed his probation.

Nearly 15 years later, in June 2005, the Department of Justice granted Maxwell's application for exclusion from the Megan's Law Web site. (§ 290.46.)

In March 2008, using an address on Coronado Street in Ventura rather than the address provided in Maxwell's section 290 registration, the Department sent the notice required by statute to begin the process of posting. Had Maxwell received the letter, he would have been advised that, due to a change in the law, he had 30 days within which to reapply for exclusion, demonstrating he was eligible for exclusion under the new requirements, by providing court documentation there was "no penetration or oral copulation involved." The Department received no application and rescinded Maxwell's exclusion, and his name and conviction were published on the Megan's Law Web site.

In April 2010, Maxwell contacted the Department, stating the Department had made a serious error. Maxwell said he had been living at a different street address in Ventura since July 2007 and had maintained his registration requirement since his conviction. He said the letter sent to his former address was never forwarded to him and he had received no other notice. He indicated that the web site disclosure had been devastating, causing him to lose employment and damage to his reputation. He forwarded an application for exclusion as directed, including the only documentation he said he was able to obtain from the Malibu courthouse due to the fact that the court had lost or destroyed the documents pertaining to his case. Counsel then submitted further documentation (including the reporter's transcript of Maxwell's plea) on Maxwell's behalf in July.

In August, the Department notified Maxwell his application had been denied because the "[d]ocuments submitted were insufficient to evaluate [his] application." He was informed that acceptable documentation could be obtained from a number of sources and the "types of documents the DOJ will accept include: [¶] Probation Department — Probation officer report, pre-sentencing report, or letter from your supervising probation department. [¶] Court – Court report prepared pursuant to PC Section 288.1 or other official court documentation. [¶] Defense Attorney – Letter from the attorney who represented you during the trial."[2]

On September 29, 2010, Maxwell filed a petition for writ of mandate, asserting he was entitled to have his name removed from the Megan's Law Web site because he is the father of his victim and "there is no evidence [his] offense involved oral copulation or penetration."

On January 25, 2011, the trial court conducted a hearing on Maxwell's petition. Maxwell testified the "incidents" underlying the complaint against him occurred in late 1987 and in early 1988 and involved his daughter who was four at the time. He said he had "improper physical sexual contact" with his daughter in a shower and in a bed in his home in the presence of his wife and son. In late 1987, Maxwell said his wife was in the bathroom while he was in the shower with his daughter. He testified he "allowed [his] daughter to touch [his] penis" and "was aroused."

On another occasion in early 1988, there was an "incident" where he was in bed with his wife and his daughter, and he "touched [his] daughter's vagina," "lying down arm over shoulder flat palm," for "maybe five seconds." Shortly thereafter, his wife took the children away and moved to Chicago. Both his wife and he filed for divorce. A police report was made in 1990. Initially, Maxwell denied the allegations, but later pled no contest to a violation of section 288, subdivision (a).

---

2 The statute requires, in section 290.46 (e)(2)(D)(i), the submission of official court documents, and does not appear to permit documentation from an attorney; however, the Department indicated to Maxwell that it was willing to accept such other documentation.

Maxwell testified he was released from probation early after four-and-a-half years, and had always registered as required. In 2005, he had been granted an exclusion from the Megan's Law Web site, but learned through his employer in April 2010 that his picture and name were on the Web site. He had been working as a construction project manager. After a client requested his removal from a project, Maxwell lost $13,000. On another occasion, he said, someone driving by his home stopped and shouted, "There's that baby raper," and gestured with his middle finger before driving off.

Maxwell further testified that he immediately contacted the Department to obtain the exclusion and denied ever receiving the Department's notice of the change in law and need for reapplication. He said he had attempted to find the court file relating to his conviction by calling the Malibu court. He was referred to the downtown archives so he went to that location but was unsuccessful in locating anything. It was suggested he call LAX archives and he also checked the Santa Monica court. The Los Angeles Superior Court Archives had given him a "missing receipt," and he had been able to locate no other documents than those presented with his petition.

The Deputy Attorney General submitted without any cross-examination, presentation of evidence, or argument. At the conclusion of the hearing, the trial court commented: "[T]here's a question of credibility," and although there was testimony both Maxwell's wife and son were present at the time, there was nothing from either of them. The court was "not convinced based on [Maxwell's] credibility and veracity" that he had satisfied his burden to provide a "clear demonstration" there had been "no penetration and/or oral copulation." "If you're able to convince other witnesses to step forward here, I certainly will entertain it. . . ." The petition was denied without prejudice.

Maxwell appeals.

DISCUSSION

Maxwell asserts that the trial court abused its discretion when it "arbitrarily and unreasonably deemed [him] unworthy of belief merely because [he] had a stake in the outcome," and that the Department failed to give him adequate notice. He is entitled to relief because the Department failed to comply with the statute's notice requirements.[3]

As explained in *Doe v. California Dept. of Justice* (2009) 173 Cal.App.4th 1095, 1102,

> "California's Megan's Law provides for the collection and public disclosure of information regarding sex offenders required to register under section 290. (*Wright v. Superior Court* (1997) 15 Cal.4th 521, 529; *Fredenburg v. City of Fremont* (2004) 119 Cal.App.4th 408, 413.) In 2004 the Legislature enacted section 290.46, which requires the Department to maintain an Internet Web site that includes information on persons convicted of specified sex offenses, such as the offender's name, address, aliases, photograph, physical description, date of birth, criminal history and other information the Department deems relevant. (§§ 290.46, subds. (a)(1), (b)(1), (2)(G) & (H); Stats. 2004, ch. 745, § 1.)
>
> Section 290.46 originally allowed offenders to apply to the Department for exclusion from the Megan's Law Web site on proof they successfully completed probation granted under section 1203.066. (§ 290.46, former subd. (e)(2)(C), enacted by Stats. 2004, ch. 745, § 1.) At the time, section 1203.066 allowed probation for certain serious sex offenses when "the defendant is the victim's natural parent, adoptive parent, stepparent, relative, or is a member of the victim's household who has lived in the victim's household." (§ 1203.066, former subd. (c)(1).) The exclusion applied to "a very narrow category of non-violent, intra-familial offenders convicted of child molestation who, unlike all other sex offenders, are eligible for probation." The Senate Committee on Public Safety explained that sometimes such cases can be prosecuted only because '"family member witnesses are willing to cooperate with prosecutors because of the availability of probation."' (Sen. Com. on Pub. Safety, Analysis of Assem. Bill No. 1323 (2005–2006 Reg. Sess.) as amended Apr. 13, 2005, for hearing on

---

3 As a result, we do not reach the additional issues raised on appeal.

> June 28, 2005, p. N, quoting Sen. Com. on Pub. Safety, Analysis of Assem. Bill No. 488 (2003–2004 Reg. Sess.) as amended June 14, 2004, for hearing on June 22, 2004, p. T.)

(*Doe v. California Dept. of Justice*, *supra*, at pp. 1102-1103, fn. omitted.)

> Effective October 7, 2005, however, the Legislature amended section 290.46 to limit the availability of the exclusion. It now applies only when an offender proves he "was the victim's parent, stepparent, sibling, or grandparent and that the crime did not involve either oral copulation or penetration of the vagina or rectum of either the victim or the offender by the penis of the other or by any foreign object." (§ 290.46, subd. (e)(2)(C)(i) as amended by Stats. 2005, ch. 722, § 7.) The offender must also prove he successfully completed probation, but the probation need not have been granted under section 1203.066. (§ 290.46, subd. (e)(2)(C)(i).)
>
> Effective September 20, 2006, the Legislature expressly made the 2005 amendment retroactive. (§ 290.46, subd. (e)(3), added by Stats. 2006, ch. 337, § 19.)

(*Doe v. California Dept. of Justice*, *supra*, at p. 1103.)

To post information on the Megan's Law Web site concerning a person, like Maxwell, who had obtained an exclusion under prior law, the Department must "rescind the exclusion, make a reasonable effort to provide notification to the person that the exclusion has been rescinded, and, no sooner than 30 days after notification is attempted, make information about the offender available to the public on the Internet Web site as provided in this section." (Sect. 290.46, subd.(e)(3).)

The statute, by requiring notice and a minimum 30-day period before information can be posted contemplates that the affected person will have an opportunity to gather and present evidence to the Department prior to the posting of any information. Maxwell did not have that opportunity. His statutory obligation to register meant, if he was in compliance, that his current address was available to the Department. The Department

presented no evidence, and has not asserted either in the trial court or in this court, that Maxwell failed to comply with his registration requirement. Moreover, the Department stood silent at the trial court, and has not asserted at this court that its mailing satisfied the condition precedent to posting that it make a "reasonable effort to provide notification."

The Department bore the burden to establish its compliance with that condition prior to placing any obligation on Maxwell to make any showing concerning his underlying conviction; it made no effort to meet that burden. Accordingly, any failure by Maxwell to produce documents that the trial court had made unavailable is immaterial, and he is entitled to have the posting removed.

DISPOSITION

The order is reversed, and the writ is ordered to be granted.

ZELON, J.

We concur:

WOODS, Acting P. J.

JACKSON, J.